79-1890

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NOS. 78-1890 and A-949

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL., AND KENAI PENINSULA BOROUGH,

Petitioners,

v.

STATE OF ALASKA,

Respondent.

BRIEF IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INDEX

	Page
Citations	ii
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement of the case	3
Reasons for denying the writ	8
Conclusion	15

CITATIONS

CASES — PAGE

Alabama v. Texas, 347 U.S. 272 (1954) 9
Ginsberg & Sons v. Popkin, 285 U.S. 204 (1932) 12
NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974) 12
Train v. Colorado Public Interest Research Group, Inc., 426 U.S. 1 (1976) 10
Udall v. Tallman, 380 U.S. 1 (1965) 5, 13
United States v. Zazove, 334 U.S. 602 (1948) 10
Zuber v. Allen, 396 U.S. 168 (1969) 13

STATUTES

Act of May 14, 1947, ch. 83, 61 Stat. 119 3
Alaska Native Claims Settlement Act of 1971, Pub. L. No. 92-203, Section 9(d), 85 Stat. 695, 43 U.S.C. § 1608(d) ...6, 12, 14
Alaska Statehood Act of 1958, Pub. L. No. 85-508, 72 Stat. 339, 43 U.S.C. note prec. § 21, ... 5
Section 6(n), 72 Stat. 343 5
Section 28(b), 72 Stat. 351 5
Federal Land Policy and Management Act of 1976, Section 317(a), 90 Stat. 2770 ..... 8, 12
General Appropriation Act of 1951, 64 Stat. 595, 693-694 4
Mineral Leasing Act of 1920, ch. 85, Section 35, 41 Stat. 450, 30 U.S.C. § 191 ..... 3, 4, 5, 6, 7, 8, 10, 12, 13, 14
Mineral Leasing Act for Acquired Lands of 1947, ch. 513, 61 Stat. 913, 30 U.S.C. §§ 351 *et seq.* 4, 14
Section 3, 61 Stat. 914, 30 U.S.C. § 352 4
Section 6, 61 Stat. 915, 30 U.S.C. § 355 ..... 4, 5
Public Law No. 85-88, Section 2(g), 71 Stat. 282 3
Public Law No. 88-523, 78 Stat. 701 6
Public Law No. 95-469, Section 1(c), 92 Stat. 1319 8
Wildlife Refuge Revenue Sharing Act of 1935, ch. 261, Section 401, 49 Stat. 383, 16 U.S.C. § 715s 4, 5, 6, 7, 8, 9, 10, 11, 13, 14

ALASKA CONSTITUTION — PAGE

Article X 7

MISCELLANEOUS AUTHORITIES

Exec. Order No. 8979, 6 Fed. Reg. 6471 (1941) 5
Cong. Opinion B-24 128, 21 Comp. Gen. 873 4
55 Comp. Gen. 117 7
H.R. Rep. No. 1753, 88th Cong. 2d Sess. (1964) 10, 11
S. Rep. No. 1096, 88th Cong., 2d Sess. (1964) 11

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The State of Alaska opposes the petitions for a writ of certiorari directed to the United States Court of Appeals for the Ninth Circuit filed by petitioners Cecil D. Andrus, Secretary of the Interior, *et al.,* (hereafter "the Federal Petitioners"), and the Kenai Peninsula Borough.

OPINIONS BELOW

The opinion of the court of appeals is reported at 611 F.2d 1210 (9th Cir. 1980). The opinion of the district court is reported at 436 F. Supp. 288 (D. Alaska 1977).

JURISDICTION

Respondent State of Alaska accepts the petitioners' statements of jurisdiction.

QUESTION PRESENTED

Whether revenues from federal oil and gas leases on reserved public lands in the Kenai National Moose Range (part of the National Wildlife Refuge System) are to be distributed according to the formula established by Section 35 of the Mineral Leasing Act of 1920, 30 U.S.C. § 191, which provides that 90 percent of such revenues are to be paid to the State of Alaska and 10 percent are to be covered into the United States Treasury, or pursuant to the formula established by the Wildlife Refuge Revenue Sharing Act, 16 U.S.C § 715s, which allocates 25 percent of the revenues it governs to the counties in which wildlife refuges are located and reserves 75 percent for federal purposes related to the Act.

STATUTES INVOLVED

1. Section 35 of the Mineral Leasing Act of 1920, 30 U.S.C. § 191.

2. The Wildlife Refuge Revenue Sharing Act of 1935, as amended, 16 U.S.C. § 715s.

3. Sections 3 and 6 of the Mineral Leasing Act for Acquired Lands, 30 U.S.C. §§ 352 and 355.

4. Sections 6(k) and 28(b) of the Alaska Statehood Act of 1958, 43 U.S.C. note prec. § 21.

5. Section 9(d) of the Alaska Native Claims Settlement Act of 1971, 43 U.S.C. § 1608(d).

STATEMENT OF THE CASE

In the Mineral Leasing Act of 1920, 30 U.S.C. § § 181 *et seq.*, the United States Congress authorized the Secretary of the Interior to lease certain federally-owned mineral deposits, including oil and gas deposits. Section 35 of the Act, 30 U.S.C. § 191, as originally enacted, provided that the revenue received from such leases was to be paid into the United States Treasury for periodic distribution. The State within which the land was located was to receive 37½%, the Federal Reclamation Fund was to receive 52½%, and the Treasury was to receive 10%. The Territory of Alaska was excluded from this distribution scheme.

In 1947, Congress passed two laws dealing with the distribution of revenues derived from mineral leases on federally-owned lands, distinguishing between public lands and acquired lands.[1] The Act of May 27, 1947, 61 Stat. 119, dealt with revenues from public lands. It rewrote Section 35 of the Mineral Leasing Act, 30 U.S.C. § 191, and directed that the Territory of Alaska, as well as the several States, was to receive a 37½% share of mineral leasing revenues from public lands within its borders.[2]

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[1] "Public lands" are lands of the public domain which have never been in state or private ownership. They are distinguished from "acquired lands", which are lands acquired by the United States from a state or citizen through purchase or grant. *See* 611 F.2d at 211, n.2.

[2] Section 2(g) of the Act of July 10, 1957, 71 Stat. 282, amended Section 35 of the Mineral Leasing Act, 30 U.S.C. § 191, to provide that the Territory of Alaska would receive an additional 52½% share of mineral lease revenues from public lands in Alaska, over and above the 37½% share granted by the 1947 amendment. This was in recognition of the fact that the Territory of Alaska was not covered by the Federal Reclamation Fund which received 52½% of revenues from mineral leases in public lands in the States. As a result of this amendment, the Territory of Alaska became entitled to 90% of all revenues derived from mineral leases on public lands in Alaska.

The Mineral Leasing Act for Acquired Lands of 1947, 30 U.S.C. §§ 351 *et seq.*, addressed mineral leases on federally-owned acquired lands. Section 3 of the Act, 30 U.S.C. § 352, authorized the leasing of minerals (including oil and gas) on such lands if the head of the executive department having jurisdiction over the lands consented to such leasing. Section 6 of the Act, 30 U.S.C. § 355, directed that the resultant revenues be distributed in the same manner as other revenues from the leased lands were distributed.

With respect to revenues from lands within wildlife refuges, Section 401 of the Act of June 15, 1935, 49 Stat. 378, 383, 16 U.S.C. § 715s, provided that 25% of non-mineral receipts from such lands[3] were to be distributed to the county or counties in which the refuge was situated, with the remaining 75% deposited in the United States Treasury.[4] Accordingly, under Section 3 of the Mineral Leasing Act for Acquired Lands, 30 U.S.C. § 355, oil and gas revenues from acquired lands in wildlife refuges also were to be distributed 25% to the counties in which the lands were located and 75% to the federal government. Oil and gas revenues from public lands in wildlife refuges, however, remained subject to distribution under the Mineral Leasing Act, 30 U.S.C. § 191: 37½% to the State within which the refuge was located, 52½% to the Federal Reclamation Fund, 10% to the federal government. As a result of the 1947 amendment to 30 U.S.C. § 191, the Territory of Alaska was entitled to 37½% of the revenues from public lands within wildlife refuges in the Territory; the 1957 amendment increased this share to 90%.

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[3] The Comptroller General of the United States ruled in 1942 that revenue from oil and gas leases on lands within wildlife refuges was not subject to distribution under 16 U.S.C. § 715s. Cong. Opinion B-24 128, 21 Comp. Gen. 873 (R. 982).

[4] With the enactment of the General Appropriation Act of 1951, 64 Stat. 595, this 75% share was made available for the management of refuges.

Section 6(k) of the Alaska Statehood Act of 1958, 72 Stat. 343, 43 U.S.C. note prec. § 21, provided that the provisions of the Statehood Act repealing portions of certain existing statutes were not to deprive the new State of Alaska of rights to revenues previously enjoyed by the Territory under the Mineral Leasing Act. Section 28(b) of the Statehood Act, 72 Stat. 351, amended Section 35 of the Mineral Leasing Act of 1920, 30 U.S.C. § 191, by changing the term "Territory" to "State" in the clause that allocated to Alaska the 52½% share of mineral revenues from public lands which otherwise would go to the Federal Reclamation Fund.

Summarizing, as of the date the State of Alaska was admitted to the Union, federal oil and gas lease revenues from lands within wildlife refuges in Alaska were to be distributed in one of two ways, depending on the nature of the lands from which the revenues were realized. If they were acquired lands, the revenues were to be distributed 25% to the county in which the lands were situated and 75% to the federal government pursuant to 30 U.S.C. § 355 and its incorporation of the 16 U.S.C. § 715s revenue distribution formula for non-mineral revenues from lands in wildlife refuges. If they were reserved public lands[5], the revenues were to be distributed 90% to the State of Alaska and 10% to the United States Treasury pursuant to 30 U.S.C. § 191.

The Kenai National Moose Range was established in 1941 when approximately two million acres of "public and nonpublic land" on the Kenai Peninsula in Alaska were withdrawn and reserved for use as a refuge and breeding ground for moose by Exec. Order No. 8979, 6 Fed. Reg. 6471 (1941). Federal oil and gas leases were first issued on the reserved public lands in the Range[6] in 1957 and 1958. R. 223, 930.[7]

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[5] "Reserved public lands" are public lands which have been set apart and reserved for a specific purpose. *See* n.1, supra.

[6] In Udall v. Tallman, 380 U.S. 1 (1965), this Court held that Exec. Order No. 8979 did not withdraw public lands in the range from federal oil and gas leasing.

[7] "R. ____" refers to the record filed in the court of appeals.

The Kenai National Moose Range is the only wildlife refuge in Alaska generating oil and gas revenues.[8] Federal Petitioners' petition at 6. Oil and gas revenues from reserved public lands in wildlife refuges in states other than Alaska are *de minimus. Id.,* n.3, and Affidavit of Lynn A. Greenwalt, Director of the United States Fish and Wildlife Service (printed as an appendix to the Federal Petitioners' brief in the court of appeals at 41-43).

The seeds of the present dispute were sown in 1964 when Congress passed Public Law 88-523, 78 Stat. 701, which amended the Wildlife Refuge Revenue Sharing Act, 16 U.S.C. § 715s, in two ways. First, separate distribution schemes were established for revenues from "reserved public lands" and those from "areas . . . acquired in fee by the United States [*i.e.,* acquired lands]." Second, without discussion in the legislative history, the word "minerals" was added to the list of revenue sources subject to distribution under the statute.

Following the 1964 amendment, the Department of the Interior continued to distribute revenues from the reserved public lands of the Kenai National Moose Range pursuant to Section 35 of the Mineral Leasing Act of 1920, 30 U.S.C. § 191. R. 297. The federal official making the decision to continue that practice was the Secretary of the Interior. R. 231.

In 1971, in Section 9(d) of the Alaska Native Claims Settlement Act of 1971, 85 Stat. 695, 43 U.S.C. § 1608(d), Congress again directed that all mineral revenues from public

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[8] In response to the State of Alaska's discovery requests, the Federal Petitioners responded that records of revenue before 1966 were "not readily available." R. 229. Between 1966 and 1976, revenues totaled approximately $57,000,000. R. 957. Since 1976, when the present suits were filed, revenues from those leases have been placed in an escrow account pending the outcome of this litigation. R. 230. That account now contains between seventeen and eighteen million dollars. Federal Petitioners' petition, pp. 5, 17-18.

lands in Alaska were to be distributed as provided in the Alaska Statehood Act (*i.e.*, pursuant to 30 U.S.C. § 191, 90% to the State of Alaska and 10% to the United States Treasury).

In 1975, eleven years after the 1964 amendment to the Wildlife Refuge Revenue Sharing Act, 16 U.S.C § 715s, the Director of the Fish and Wildlife Service asked the Solicitor of the Department of the Interior whether the 1964 amendment to 16 U.S.C. § 715s required that oil and gas revenues from reserved public lands in wildlife refuges be distributed pursuant to that statute and not the Mineral Leasing Act of 1920, 30 U.S.C § 191; the Solicitor opined that it did. R. 179. The Comptroller General of the United States concurred in the Solicitor's opinion. 55 Comp. Gen. 117 (R. 185). In response to a request by the State of Alaska for reconsideration (R. 190), the Solicitor affirmed his earlier decision. R. 211.

Shortly thereafter, the State of Alaska sued the Secretary of the Interior, the Comptroller General, and the Secretary of the Treasury, seeking a declaration that distribution of the oil and gas revenues from the reserved public lands of the Kenai National Moose Range was governed by Section 35 of the Mineral Leasing Act of 1920, 30 U.S.C § 191, and resumption of the payments of 90% of such revenues to the state which had been suspended on the basis of Solicitor's and Comptroller General's opinions. R. 1-9. Kenai Peninsula Borough, the county-type political subdivision[9] within which the Kenai National Moose Range is located, also sued the Secretary of the Interior seeking a declaration that 16 U.S.C. § 715s controls the distribution of oil and gas revenues from the reserved public lands within the Range and for an order requiring the Secretary to pay the borough 25% of such revenues, to account for past payments made to the State of Alaska, and to recover such past payments for the borough's benefit. R. 14-23.

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[9] Alaska has no political subdivisions known as "counties." The Alaska analogue is the "borough." *See* Alaska Const., art. X, and R. 854.

At virtually the same time, Congress enacted Section 317(a) of the Federal Land Policy and Management Act of 1976, 90 Stat. 2770, a comprehensive re-enactment of 30 U.S.C. § 191 which increased to 50% the share of mineral revenue from public lands received by other States and re-enacted Alaska's 90% share of such revenues.

On August 18, 1977, the district court granted summary judgment for the State of Alaska, holding that Section 35 of the Mineral Leasing Act of 1920, 30 U.S.C. § 191, controls the distribution of oil and gas revenues from the reserved public lands within the Kenai National Moose Range both before and after the 1964 amendment to the Wildlife Refuge Revenue Sharing Act, 16 U.S.C. § 715s, and that the latter statute controls distribution of mineral revenues derived from acquired lands in wildlife refuges. 436 F. Supp. 288 (D. Alaska 1977). On February 5, 1980, the court of appeals affirmed the decision of the district court. 611 F.2d 1210 (9th Cir. 1980).

The Wildlife Refuge Revenue Sharing Act, 16 U.S.C. § 715s, was substantially revised in 1978 when Congress enacted Section 1(a) of Public Law 95-469, 92 Stat. 1319. During deliberations on the bill, the House of Representatives proposed making it applicable to oil and gas revenues from reserved public lands, as well as acquired lands, in wildlife refuges. However, the Senate Committee on Environment and Public Works deleted that proposed amendment on the ground that it was "inappropriate to legislate on this matter pending a determination by the court." S. Rep. No. 95-1174, 95th Cong. 2d Sess., 4, reprinted in [1978] U.S. Code Cong. & Admin. News, pp. 2979, 2982.

REASONS FOR DENYING THE WRIT

1. The issue in this case is too narrow to warrant review by this Court on certiorari. As the Federal Petitioners acknowledge, the Kenai National Moose Range is the only wildlife

refuge in Alaska currently generating oil and gas revenues, and oil and gas revenues from reserved public lands in wildlife refuges in other states are *de minimus.* Federal Petitioners' petition,
p. 6 and n.3. Accordingly, the decision in this case will have no application beyond the Kenai National Moose Range and the parties to this action.

Both the Federal Petitioners and petitioner Kenai Peninsula Borough speculate that other wildlife refuges in Alaska may have significant oil and gas revenue potential. Federal Petitioners' petition, pp. 6, 18; Kenai Peninsula Borough's petition, p. 8. Accordingly, they hypothesize, the decision in this case may affect distribution of revenues which may be realized from those lands at some unspecified time in the future. *Id.* Because of that doubly speculative possibility, they urge this Court to exercise its discretion and grant review. However, such a speculative possibility does not appear to be one of the "special and important reasons" for granting review or writ of certiorari contemplated by Supreme Court Rule 19.1.

Moreover, on several occasions this Court has stated that determinations regarding the administration of public lands should be made by Congress and not by the courts. *See, e.g., Alabama v. Texas,* 347 U.S. 272, 273-274 (1954), and cases cited. Had this issue not been in litigation in the courts below, it is likely that Congress already would have resolved the matter. The question of the meaning of "minerals" in 16 U.S.C. § 715s and its application to mineral lease revenues on reserved public lands in wildlife refuges was before Congress in 1978. However, because of this litigation, Congress deferred resolution of the issue. *See* 612 F.2d at 1214 n.6.

Nor should the Court be persuaded to grant the writ on the basis that "substantial sums" (Federal Petitioners' petition, p. 17) or "significant amounts of revenue" (Kenai Peninsula Borough's petition, p. 7) are involved. The total revenue from federal oil and gas leases on the Kenai National Moose Range between 1966 and 1976 was $57 million. R. 949. Since 1976,

an additional $17-18 million have been escrowed pending this litigation. Federal Petitioners' petition, pp. 5, 17-18. These amounts should be contrasted to the amounts involved in cases such as *United States v. Zazove,* 334 U.S. 602, 613-614, (1948) ("billions of dollars"). While not insubstantial, the amounts involved in this case do not justify review by this Court.

2. The court of appeals fully considered and correctly decided the question presented. As the court of appeals noted, 612 F.2d at 1212, the parties agreed that there is an irreconcilable conflict between the revenue distribution provisions of the Wildlife Refuge Revenue Sharing Act, 16 U.S.C. § 715s, and the Mineral Leasing Act of 1920, 30 U.S.C. § 191.[10] To resolve the conflict, the court of appeals undertook an exhaustive analysis of the legislative history of the 1964 amendment to 16 U.S.C § 715s in an effort to ascertain the underlying congressional intent, as it was required to do under the cases cited in its opinion at 612 F.2d at 1213. Following that exhaustive analysis, the court of appeals concluded that, although the legislative history of those amendments did not conclusively resolve the issue, the few items of legislative history which exist[11] indicate that Congress intended no change in the preexisting scheme under which mineral revenues from reserved public lands in wildlife refuges were distributed pursuant to 30 U.S.C. § 191. 612 F.2d at 1214 n.7. Given these facts, its decision affirming the district court's decision was correct and should not be disturbed.

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[10] Accordingly, the reliance of both the Federal Petitioners' petition (p. 14) and petitioner Kenai Peninsula Borough's petition (pp. 9-10) on the so-called "plain meeting rule" of statutory construction is misplaced. Train v. Colorado Public Interest Research Group, Inc., 426 U.S. 1, 9-10 (1976).

[11] Both the House and Senate reports on the bill stated that the 1963 payments to counties from the Kenai National Moose Range under 16 U.S.C. § 715s totalled $1,768, and would have been identical had the 1964 amendment been in effect in 1963. H.R. Rep.

(Footnote continued on following page)

3. Review of the decision below necessarily will require an exhaustive review of the legislative history of the 1964 amendment to 16 U.S.C. § 715s, a fact-finding inquiry already performed by the courts below and found by the court of appeals to be inconclusive on the issue of congressional intent. 611 F.2d 1214.[12] Further review of the legislative history by this Court is unwarranted.

4. Both the Federal Petitioners and petitioner Kenai Peninsula Borough argue that this case presents important questions of statutory construction. Federal Petitioners' petition, pp. 15-16; Kenai Peninsula Borough's petition, pp. 8-10. However, at bottom, the process of statutory construction

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(Footnote continued from preceding page)

No. 1753, 88th Cong., 2d Sess. 3 (1964) (hereafter "House Report"), R. 590, 592; S. Rep. No. 1096, 88th Cong., 2d Sess. 13 (1964) (hereafter "Senate Report"), R. 614, 626. Had Congress intended to make the oil and gas revenues from the Range subject to distribution under the amended statute, that figure would have been increased by almost $1 million, 25% of oil and gas revenues which totalled $3,813,290 in 1964 (*see* 45 of Affidavit of Lynn A. Greenwalt, Director of the United States Fish and Wildlife Service, published as an appendix to the Federal Petitioners' brief before the court of appeals at pp. 41-43. Under the amendment, although some counties would get more, "the increase [would] only be equitable and there [would] be no windfall or bonanza." Senate Report, p.3; R. 616. Had Congress intended the amendment to affect oil and gas revenues from the Range, the payments to counties from the Kenai National Moose Range (*i.e.*, to the Kenai Peninsula Borough) would have included an additional "windfall or bonanza" of $953,322 over and above the $1,768 listed in the reports. Furthermore, Congress expected that the wildlife refuge fund would decrease if the amendment was adopted. House Report, p. 12; R. 601. However, if Congress had intended the amendment to reach oil and gas revenues from the Range, the fund would have been increased by almost $3 million (75% of the $3,813,290 in 1964 revenues).

[12] Respondent State of Alaska believes that the legislative history of the 1964 amendment demonstrates beyond question that Congress intended no change in the pre-1964 practice.

(including the use of the canons of statutory construction urged by petitioners) is to ascertain the intent of Congress, which is what both the district court and the court of appeals did here.

Furthermore, canons of statutory construction not cited by petitioners support the decision reached by the court below. For example, this Court has stated that "[s]pecific terms prevail over the general in the same or another statute which otherwise might be controlling." *Ginsberg & Sons v. Popkin,* 285 U.S. 204, 208 (1932). Section 35 of the Mineral Leasing Act of 1920, 30 U.S.C. § 191, specifically provides that the State of Alaska is to receive 90% of money received from public lands in Alaska. This distribution scheme was reaffirmed when Congress enacted Section 9(d) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1608(d), which specifically directed that all mineral revenues from public lands in Alaska were to be distributed as provided in the Alaska Statehood Act, which in turn required that they be distributed pursuant to 30 U.S.C. § 191.

In addition, Section 317(a) of the Federal Land Policy and Management Act of 1976, 90 Stat. 2770, was a comprehensive re-enactment of 30 U.S.C. § 191. It increased the share of mineral revenues from public lands which all states other than Alaska were to receive from 37½% to 50%, and specifically re-enacted Alaska's 90% share of "[a]ll money received from sales, bonuses, royalties, and rentals of the public lands." This is "persuasive evidence" that Congress intended the pre-existing revenue distribution scheme to be continued. *NLRB v. Bell Aerospace Co.,* 416 U.S. 267, 275 (1974), and cases cited.

Finally, the doctrine of contemporaneous construction supports the decisions below.[13] Following the effective date of

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[13] The Federal Petitioners argued in the court of appeals that the Department of the Interior's new interpretation in 1975 is entitled to the customary deference shown to agency interpretation. However, the court of appeals properly showed less deference to the new interpretation than it gave to the contemporaneous 1964 interpretation. *See* 612 F.2d at 1214-1215 n.8.

the 1964 amendment to 16 U.S.C. § 715s, the Secretary of the Interior determined that the oil and gas revenues from the Kenai National Moose Range should be governed by 30 U.S.C. § 191 and, not by amended 16 U.S.C. § 715s. R. 231. As this Court stated in *Udall v. Tallman, supra,* at 16:

> When faced with the problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. 'To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.' Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.'

(Citations omitted.) The 1964 amendments to 16 U.S.C. § 715s charged the Secretary of the Interior with receiving and distributing the wildlife refuge receipts subject to that statute. He also was responsible for administering 30 U.S.C. § 191.

Moreover, a contemporaneous administrative construction "carries most weight when the adminstrators have participated in drafting and directly made known their views to Congress in committee hearings." *Zuber v. Allen,* 396 U.S. 168, 192 (1969) (citations omitted). Not only did Department of the Interior officials directly make their views on the proposed amendment to 16 U.S.C. § 715s known to Congress on several occasions, *see* R. 389, 390, 399, 410, 460, 463, 485, 487, 547, 572, 580, 602, 608, 611, 636, 637, 686, 693, 708, 735, 757, 782, 790, 794, 807, 817, and 832, they made frequent suggestions regarding possible amendments. *See* R. 390, 399, 410, 460, 487, 572, 580, 602, 637, 782, and 807.

Both the district court and the court of appeals have concluded that the Secretary's contemporaneous construction was correct, and it should not be reviewed by this court on a writ of certiorari.

5. The construction of 16 U.S.C § 715s urged by petitioners would be manifestly unfair to Alaska Natives. Under Section 9(d) of the Alaska Native Claims Settlement Act of 1971, 43 U.S.C § 1608(d), 2% of the gross revenues from "minerals in public lands in Alaska" are to be paid into the Alaska Native Fund. Between 1972, the first year payments were made to the fund, and 1976, gross Mineral Leasing Act revenues from public lands in Alaska totalled $37,237,933.20, with the fund receiving $4,332,184.39. R. 230.[14] Of those revenues, $28,369,204.84 (76%) was attributable to federal oil and gas leases in the Kenai National Moose Range. R. 957. If those revenues are not to be distributed as provided in the Alaska Statehood Act (*i.e.*, pursuant to 30 U.S.C. § 191), they would be taken out of the coverage of Section 9(d) the Alaska Native Claims Settlement Act as well, and contributions to the Alaska Native Fund would be reduced accordingly. In addition, the fund could be required to refund all moneys previously received which are attributable to Kenai National Moose Range oil and gas receipts.

6. There is an independent ground on which the decisions below must be affirmed. The 30 U.S.C § 191 distribution formula for revenues from public lands in Alaska (which include reserved public lands in wildlife refuges) is required by the Alaska Statehood Act, a solemn compact between the United States and Alaska which formed the basis for Alaska's admission to the Union. Any post-statehood deviation from that scheme (such as the construction of 16 U.S.C § 715s urged by petitioners here) would impermissibly violate that compact.

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[14] The figures showing payment to the Alaska Native Fund do not equal 2% of the gross revenues shown. No explanation of this discrepancy is given.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted this _____ day of July, 1980.

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